No. 492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BARNABAS F. SEARS,
One North LaSalle Street,
Chicago 2, Illinois.

WILLIAM RUFUS MORGAN,
105 W. Monroe Street,
Chicago 2, Illinois.

Attorneys for Petitioners.

Scheffer Printing Company, Del. 7171

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NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, a New York Corporation, not individually but as Trustee under Trust Indenture dated April 28, 1931, between Tessie A. Cohn and James A. Cole, as Settlors,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, a municipal corporation, and ALBERT W. HARRIS, HARRY C. HAGERTY, HARRY M. ADDINSELL, M. H. MacLEAN and THOMAS B. BUTLER, as members of Chicago Railways First Mortgage Bondholders Protective Committee; WILLIAM McCORMICK BLAIR, JOHN W. ESMOND, STANLEY FIELD, WILLIAM C. FREEMAN and CHARLES H. THORNE, as members of Chicago City Railway Company and Calumet and South Chicago Railway Company First Mortgage Bondholders Protective Committees; JOHN E. BLUNT, WALTER S. BREWSTER, JOHN A. CHAPMAN and PERCY B. ECKHART, as members of Chicago Railways Company Consolidated Mortgage Series A Bondholders Protective Committee; CHARLES F. AXELSON, A. V. MORTON, and ORES E. BEHR, as members of Chicago Railways Company Purchase Money Mortgage Bondholders Protective Committee; and MARTIN LINDSAY, C. F. GLORE, W. FINDLEY DOWNS and A. R. BONE, as members of Chicago City and Connecting Railways Collateral Trust Bondholders Protective Committee,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved here is the validity of an order (R. 92) of the United States Circuit Court of Appeals for the Seventh Circuit dismissing appeals of the petitioners from orders (R. 50, 51, 53) of the United States District Court for the Northern District of Illinois, Eastern Division, entered September 12, 1947.

On September 29, 1947, petitioners filed in the District Court notices of appeal (R. 54) from the orders of September 12, 1947, their joint statement of points relied on for reversal and their joint designation of appeal record (R. 84). Thereafter, on the same day a designation of record (R. 58) was filed in the District Court by respondents, and at 3:15 p. m. petitioners were served with a copy of an unverified emergency motion to docket and dismiss the appeals (R. 65) and a copy of the designation so filed by respondents and were then notified to appear in the Circuit Court at 4:00 p. m. for a hearing of the motion (R. 83). At 4:00 p. m. counsel for the petitioners appeared in the Circuit Court and were then advised by the Clerk that the motion had been continued to 9:30 a. m.,

September 30, 1947 (R. 83). At that time counsel appeared in the Circuit Court and the emergency motion and short record called for by respondents designation and petitioners verified objections thereto were filed therein (R. 64, 81). In the objections the petitioners objected to a hearing of the motion under the circumstances and contested the grounds of the motion (R. 83-89). Thereupon counsel argued orally, and proceedings were had as shown by the record (R. 104-147). The appeals were dismissed from the bench at the conclusion of the arguments (R. 146, 147); and on the same day an order of dismissal was entered and mandates were issued to the District Court (R. 92). The record designated by respondents was on file when the motion came on for hearing; but at no time during the proceedings in the Circuit Court was the record designated by petitioners or their statements of points relied upon for reversal on file or otherwise before that Court (R. 84, 85).

The orders appealed from were entered in the District Court after a hearing of petitions filed by the petitioners on September 3, 1947 (R. 3). The cause in which the petitions were filed was a proceeding under Chapter X of the Bankruptcy Act to reorganize the Chicago Railways Company, an Illinois corporation, Debtor. The petitioners had been excluded from participation as creditors in the assets of the Debtor by orders approving and confirming a plan of reorganization which were affirmed by the Circuit Court, *In Re Chicago Rys. Co.* 160 Fed. (2) 59; and *certiorari* denied on April 14, 1947.

Briefly, the petitions filed in the District Court (R. 4) sought to relax and modify the injunction contained in an Order of Sale, in the Chapter X proceeding insofar as it enjoined petitioners from suing the City of Chicago and

the Chicago Transit Authority, neither one being the debtor in bankruptcy. The petitions alleged that rights against the City of Chicago and the Chicago Transit Authority had been conferred upon petitioners by a statute of the State of Illinois, an ordinance of the City of Chicago and a consolidated mortgage (R. 6). The petitions averred that the injunctive order prohibited petitioners from suing to enforce those rights (R. 14). In other words, all that the petitions sought was to relax and modify the injunctive order insofar as it precluded petitioners from prosecuting in an appropriate forum a plenary suit against persons other than the debtor. The nature of the asserted cause of action and the provisions of the injunctive order are more specifically set forth in the brief (*Infra*, p. 11 *et seq.*).

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., 347 (a)). The judgment of the Circuit Court of Appeals sought to be reviewed was entered September 30, 1947.

III.

THE QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals acquire jurisdiction to dismiss appeals within 24 hours after the timely filing of notices of appeal in the District Court, upon unverified "emergency" motions of respondents and short record designated by them, which did not show any failure by petitioners to comply with the legal requirements of an appeal, did not include petitioners' statement of points

relied upon for reversal and, with minor exceptions, contained none of the record called for by petitioners' designation of record, though petitioners' designation of record and statement of points relied on for reversal were on file in the District Court within the time provided by the Rules and at the time respondents filed their designation in the District Court?

2. By dismissing appeals within 24 hours after notices of appeal were filed in the District Court upon unverified "emergency" motion of respondents and short record designated by them which did not show any failure on the part of petitioners to comply with the legal requirements of an appeal, did not include petitioners' statement of points relied upon for reversal and, with minor exceptions, contained none of the record called for by petitioners' designation of record, though petitioners' designation of record and statement of points relied on for reversal were on file in the District Court within the time provided by the Rules and at the time respondents filed their designation in the District Court, did the Circuit Court of Appeals, in any one or more of those particulars, deny petitioners due process, contrary to the Fifth Amendment to the Constitution of the United States?

3. Did the District Court have jurisdiction to issue an injunctive order restraining the prosecution by petitioners of the suits contemplated by the petitions to relax and modify said injunctive order?

4. Was the substantive question raised by the petitions previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the Plan and, if so decided, being a question of jurisdiction of the subject matter, may it not be reconsidered on this appeal?

5. Were the orders from which the appeals were taken appealable orders?

6. Do petitioners have an appealable interest in the subject matter of these appeals?

7. Did the question presented by the petitions, namely, whether petitioners had the right to prosecute the causes of action asserted, present questions of the constitutionality and construction of state laws, which should be left to appropriate decision in proceedings in the state courts?

8. Is the effect of the decision of the Circuit Court of Appeals to ignore state decisions upon local or state matters binding on the Federal courts?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. (See Questions Presented 1 and 2).

2. The Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be settled by this court, namely, the question of the jurisdiction of a Circuit Court of Appeals to dismiss an appeal. (See questions Presented 1).

3. In dismissing the appeals notwithstanding petitioners' invocation of the due process clause of the Fifth Amendment, The Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this court, namely, whether that court denied petitioners an opportunity to be heard. (See Questions Presented 2).

4. Petitioners have never had a review of the constitutional question whether the Circuit Court of Appeals denied them due process of law, arising as it did for the first time in that court. Nor did petitioners have an initial hearing of that question in that court by reason of the very circumstances out of which the question arose. (See Questions Presented 2).

5. The decision of the Circuit Court of Appeals, in dismissing these appeals, and thereby precluding petitioners under penalty of contempt from prosecuting their claimed causes of action against the city of Chicago and the Chicago Transit Authority, is in conflict with their prior decision *in re Diversey Bldg., Corporation*, 86 F (2d) 456 and the decision of the Second Circuit *in Re Nine North Church Street, Inc.*, 82 F. (2d) 186, both holding that a court in bankruptcy has no jurisdiction to extinguish liabilities of persons other than the debtor and no jurisdiction to enjoin the prosecution of suits to enforce such liabilities. (See Questions Presented 3, 4, 6).

6. The decision of the Circuit of Appeals, in dismissing these appeals, and thereby precluding petitioners under penalty of criminal contempt from prosecuting their claimed causes of action against the City of Chicago and the Chicago Transit Authority in effect determines that under the Ordinance of 1907, passed pursuant to the Mueller Act of the State of Illinois, petitioners have no cause of action as aforesaid. Whether they have or not is a question of the construction and constitutionality of the Act and the ordinance, a matter to be determined solely by the state court. The decision is therefore contrary to *American Federation of Labor* v. *Watson*, 327 U. S. 582, 599, and related cases, holding that the Federal Courts will not pass upon the constitutionality and construction of state statutes and ordinances in the absence of an authori-

tative state court decision. There was none here for the obvious reason that no question of liability such as is urged here could conceivably arise until the City had designated a licensee to acquire the property or granted a franchise to another company (See Sec. 23 of Ordinance; R. 6), which didn't occur until Apr. 23, 1945 (R. 8, 9).

7. The decision of the Circuit Court of Appeals, in dismissing these appeals, and thereby precluding petitioners under penalty of criminal contempt from prosecuting their asserted causes of action in effect determines that under the Ordinance of 1907, passed pursuant to the Mueller Act of Illinois, petitioners have no cause of action as aforesaid. This is directly contrary to *Chgo. City Ry. Co.* v. *Chgo.*, 323 Ill. 245, 252, squarely holding that the ordinance was a contract between the City and the Chicago City Ry. Co., the decision of Judge Wilkerson in *Harris Trust and Savings Bk.* v. *Chgo, Rys. Co.*, 39 F. (2d) 958,960, that the statute and ordinance manifested a "clear intention . . . to provide assurance, legally obligatory upon the city for the protection of the investment" and the decision in *Carson Pirie Scott & Co.* v. *Parrett*, 346 Ill. 252, 257, permitting a third party to sue directly on a contract entered into for his benefit. The decision is therefore contrary to *Erie Railroad Co.* v. *Tompkins*, 309 U. S. 64, and related cases, holding that in matters of state law, the Federal Courts are bound by state decisions.

8. The decision of the Circuit Court of Appeals is in conflict with *Lynch* v. *Durfey*, 180 Fed. 2d 181 (9th Circuit), holding that it was improper to dismiss appeals on an inadequate record. (See Questions Presented 1).

V.

PRAYER.

Wherefore, your petitioners pray that a writ of *certiorari* issue under the seal of this court, directed to the Circuit Court of Appeals for the 7th Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the cases numbered and entitled on its docket, No. 9471, Appeal of Central Hanover Bank and Trust Company, as trustee, etc.; No. 9472, Appeal of Nahum Birnbaum, et al. and No. 9473, Appeal of James A. Cole; to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

BARNABAS F. SEARS,
WILLIAM RUFUS MORGAN,
Counsel for Petitioners.

December, 1947.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

No written opinion was delivered. The appeals were dismissed upon respondents' emergency motion to docket and dismiss same. The court heard oral arguments, at the conclusion of which it orally pronounced its judgment from the bench. (R. 146,147).

II.

STATEMENT OF THE CASE.

The Order of Sale entered in the reorganization of the debtor, Chicago Railways Company, enjoined all proceedings of any nature by any person participating in the reorganization proceeding against any person participating therein. This includes the petitioners, the City of Chicago and the Chicago Transit Authority, the purchaser of the properties of the debtor. Specifically, that injunctional order is as follows (R. 14):

"Injunction to Protect Purchaser

"The creditors and stockholders of and participating certificate holders and claimants against any of the companies or the Chicago City and Connecting Railways Collateral Trust or their trustees or receivers, including, but without limiting the generality of the foregoing, all holders of bonds and coupons issued under any mortgage or trust indenture executed by any of the companies or said Trust and all persons claiming by, through or under the companies or said

Trust or their Trustees or Receivers either as or under its creditors or stockholders or the holders of its participating certificates (except the holders of those claims or obligations or liabilities to be assumed by the purchaser pursuant to the provisions of Article IV of this order) are hereby, severally and respectively, perpetually enjoined from prosecuting against the purchaser, or any nominee or assignee or grantee of the purchaser, or against any party to these proceedings, or person required to do anything under this order, or against any person or corporation claiming by, through or under them or any of them, or against any of the property sold pursuant to this order, any suit or proceeding arising out of or based upon any obligation or liability of any of the companies or said Trust or their Trustees or Receivers, or otherwise, to impose liability upon the purchaser or upon any nominee or assignee or grantee of the purchaser, or upon any party to these proceedings, or person required to do anything under this order, or upon any person or corporation claiming by, through or under them or any of them, or upon any property sold pursuant to this order, in respect of any claim against any of the companies or said Trust or any of their Trustees or Receivers, or any trustee under any mortgage or trust indenture, or any claim under or in respect of any bond or coupon issued under any mortgage or trust indenture of any of the companies or said Trust, or in respect of the indebtedness represented thereby, or to charge the purchaser or any nominee or assignee or grantee of the purchaser, or any party to these proceedings, or person required to do anything under this order, or any person or corporation claiming by, through or under them or any of them, or any property sold pursuant to this order, with any liability on or in respect of any matter or thing adjudicated by or done or omitted to be done in pursuance of this order except pursuant to the provisions of and in subordination to this order.

"Without limiting the generality of the foregoing, the persons enjoined pursuant to this order include all holders of bonds issued under and secured by any mortgage, trust deed or other instrument executed by any of the companies, or the Chicago City and Connecting Railways Collateral Trust; and also all creditors, stockholders and security holders of each and every class of any of the companies or said Trust, including any class of Participating certificate holders and the trustees for any class of participating certificate holders, whether or not any such creditor, stockholder or security holder shall have filed proof or notice of a claim or interest pursuant to the orders of this Court heretofore made and entered; all intervenors herein; all mortgage or indenture trustees or trustees for any class of Participating certificate holders; and all such parties or persons in interest who were or had the right to be heard in the above entitled causes with respect to the Plan or any other matter before the Court in said causes.

"Whenever used in this order, the word 'person' shall be deemed to include the plural as well as the singular and shall be deemed to include firms, associations and corporations as well as individuals."

Petitioners, who are Series B bondholders of the Chicago Railway Company, (Petitioner Cole in addition owns Participating Certificates for the stock of that company) were denied participation under the Plan of Reorganization of said debtor. (160 F (2) 59.) In addition to and independently of their rights against the debtor, petitioners also claim rights "arising out of or based upon" the "obligation or liability" of the City of Chicago or the Chicago Transit Authority, the purchaser of the properties in question, or both, under an ordinance of the City of Chicago passed in 1907 pursuant to statutory authority.

The broad sweeping injunctional order, preventing peti-

tioners from asserting these rights (Rec. 14) under penalty of contempt, required petitioners to file the instant petitions. These petitions sought merely to relax and modify the provisions of the injunctional order so that petitioners might file appropriate proceedings in the state courts for the enforcement of these claimed independent rights (Rec. 17). That is the sole and only substantive issue at bar.

Nature of Cause of Action Asserted.

We now set forth briefly the nature of this independent cause of action solely for the purpose of indicating to the Court that it is not of a frivolous nature; for obviously the question of whether or not we have a valid cause of action is for the state court to determine inasmuch as it involves purely local law.

In 1907, the City of Chicago also had a traction problem. To solve that problem, the Mueller Act was passed by the General Assembly of Illinois (Laws of 1903, page 285; Jones and Addington Illinois Statutes Annotated, Chapter 131 (a), Section 11121). Its title was "To Authorize Cities to Acquire, Construct, Own, Operate and Lease Street Railways and to Provide the Means Therefor." The Act authorized cities to "own, construct, acquire, purchase, maintain and operate street railways within its corporate limits and to lease the same * * * to any company * * * for the purpose of operating street railways for any period not longer than 20 years on such terms and conditions as the City Council shall deem for the best interest of the public." It also provided that any city could "incorporate in any grant of the right to operate street railways and grant of the right to operate street railways, a reservation on the part of such city to take over all or part of such street railways at or before the expiration of such grant upon

such terms and conditions as may be provided in the grant" and in case such reserved right be not exercised by the city and it shall grant a right to another company, to operate a street railway in the streets and parts of streets occupied by its grantee under the former grant, the new grantee shall purchase and take over the street railway of the former grantee upon the terms that the City might have taken it over (Appendix I, *infra*, p. 56).

At this time, there were several street railways operating under the name of Union Traction System and were in receivership in the United States District Court (*Chicago* v. *Harris Trust & Savings Bank*, 40 Fed. (2d) 612.) Petitioner Cole and his family were the holders of the securities of one or more of them. (R. 5, 6) Armed with the legislative grant, the City participated in the reorganization and the Chicago Railways Company was incorporated to take over the properties. To induce the security holders of Union Traction and its affiliated companies to participate in the plan, the City of Chicago passed the Traction Ordinance of 1907. The ordinance embodied covenants whereby the City of Chicago reserved the right to purchase the properties for a base price fixed in the ordinance plus additions and extensions at a figure to be approved by the Board of Supervising Engineers created under the ordinance. The ordinance further provided that if the City of Chicago or its licensee should not purchase the properties on or before February 1, 1927, and if the City should thereafter purchase or designate a licensee to purchase said properties, or if the City should grant a right to another company to operate a street railway, then the City or such licensee or new company should be obligated to pay the ordinance price for the properties (see Sec. 23 thereof; R. 6).

As of January 31, 1947, the ordinance purchase price for Chicago Railways was $101,648,771.55 (R. 9). The City of Chicago granted a franchise to Chicago Transit Authority on April 23, 1945, and the latter purchased the Railways' property at the sale under the Plan for $44,475,000.00.

While the following might be more properly presented in the argument, we deem it not amiss to here state that in *Harris Trust and Savings Bank* v. *Chicago Railways Co.*, 39 Fed. (2) 958, (the City of Chicago was a party), Judge Wilkerson stated with respect to the ordinance and statute in question (960):

> "With this contention, the Court does not agree, for the reason that the City Ordinances above referred to and the Act of the Illinois Legislature on May 18, 1903 (commonly known as the Mueller Law, Illinois Statutes, (Cahill's Rev. St. 1927), c. 131a, pars. 8-13), in pursuance of which these ordinances were adopted, seem to the court to manifest a clear intention not only to provide terms and conditions covering the city's consent to the use of city street during the grant, *but also to provide assurance, legally obligatory on the city, for the protection of the investment 'at and after' as well as 'during' the term expiring February 1, 1927*". (Italics ours)

This is borne out by the fact that one of the special conditions of the Ordinance (special conditions, Sec. 1 (a) (e),) was the exchange of securities of predecessor companies to the Chicago Railways and the acceptance by those security holders of Series B bonds and participating certificates of said Chicago Railways here involved. (This ordinance is not in the present record for the reason that, although attached to the original petitions as Exhibit A (R. 6), respondents failed to incorporate it in the record on appeal. It was called for by our designation). So that

actually these prior security holders gave up their securities and accepted securities of the Chicago Railways upon the faith of said ordinance.

Petitioners further claim that this ordinance was a contract between the City and the Railways (*Chgo. City Ry. Co.* v. *Chgo.*, 323 Ill. 245, 252) and persons who gave up their security and took B bonds in the Railways upon the faith of said ordinance, or, if only a contract between the City and the Railways, that it was entered into for the direct benefit of such persons who so took B bonds entitling such persons to directly sue thereon for breach thereof (*Carson Pirie Scott & Co.* v. *Parrett*, 346 Ill. 252, 257); that the City of Chicago was in effect a guarantor to them that the provisions of the ordinance would be abided; that the purchaser, Chicago Transit Authority, acquired the franchise and purchased the properties with knowledge of and subject to the provisions of said ordinance and thereby became liable thereunder; that these *rights* which inure directly to them under the ordinance were neither assets nor liabilities of the debtor, Chicago Railways Company; and that the District Court could not jurisdictionally enjoin petitioners from prosecuting a plenary action in the State Court for the enforcement of those rights against the City of Chicago and the Chicago Transit Authority, they not being debtors in said proceeding, and their liabilities and obligations therefore not being the subject matter of composition limitation, modification or extinguishment.

Proceedings in Circuit Court of Appeals.

We have heretofore in the summary statement set forth the disposition of the petitions to relax and modify the injunctive order by the District Court and the disposition of the appeals from the orders denying same. The

"emergency" motion to dismiss the appeals was unverified and was supported only by the short record filed by respondents which, as we have pointed out, did not contain petitioners statement of points relied on for reversal and, with minor exceptions the record matters called for by petitioners' designation of record. Both petitioners' designation of record and statement of points relied upon for reversal were on file in the District Court at the time respondents designation of record was filed therein (R. 84, 85).

The emergency motion to docket and dismiss the appeals assigned three grounds therefor (R. 69):

1. The order from which these appeals are taken is not an appealable order: The order denies and dismisses petitions which seek rehearing or modification of prior orders and attempts to relitigate questions admittedly settled by the Plan and adjudicated by the orders of approval and confirmation. Two of said petitions seek specifically to amend the order of sale entered March 7, 1947 (from which order three appeals were taken and dismissed by this Court on April 21, 1947. Nos. 9353, 9354, 9355).

2. All substantive questions raised by the petitions filed in the court below were decided by this court in its decision affirming the District Court's approval and confirmation of the Plan. The petition to amend or alter the order of sale is based on precisely the same grounds which were urged in this Court against the motion to dismiss the appeal from that order.

3. The appellants have no appealable interest in the subject matter of this appeal. Under the opinion and judgment of this Court entered January 4, 1947, appellants "have no equity". (Petition for certiorari to review that judgment was filed April 3, 1947; motion to advance disposition thereof was filed April 11; certiorari was denied April 14, 1947.)

The emergency character of the motion was stated therein to be as follows (R. 66):

> The existence of these appeals creates a critical condition. The Authority is now prepared to pay the purchase price and accept delivery of the property on September 30, 1947; thus, ending over twenty years of litigation.
>
> When the money is obtained from the purchasers of the bonds, counsel for the underwriting syndicate must certify to good title in the Authority. The bonds were sold to the public subject to such opinion of counsel. If an undisposed appeal appears on the opinion of title, it could disrupt the entire transaction because bond buyers, being laymen, would have no judgment as to whether or not the appeal possesses substance. This may well place the entire sale of the bonds in jeopardy. Over two and one-half years of incessant labor have gone into bringing this plan as close to realization as it is today. The money has been subscribed—the documents of transfer are ready for delivery. The public interest in the consummation of this sale is paramount. Frivolous and unfounded appeals such as these should never be permitted to frustrate and defeat that interest. These appeals have no substance or merit. They are being interposed at the last moment for the sole purpose of thwarting the consummation of this Plan.

As indicated, this motion was unverified.

To this emergency motion petitioners filed verified objections (R. 83) as follows:

> 1. This court has no jurisdiction to entertain and dismiss this appeal as there was not transmitted to this court, nor is there on file herein, a sufficient appeal record in conformity with the rules in such cases made and provided.
>
> 2. These appellants object to a hearing of this

motion at 9:30 a. m. on September 30, 1947, for the reason that they were not served with notice of this motion until 3:15 p. m. on September 29, 1947, and were then noticed to appear at 4:00 p. m. on said date for a hearing on said motion before this court, which as a matter of courtesy to this court, they then and there did, at about which time they were advised by the Clerk of this court that the motion had been continued to 9:30 a. m. on September 30. It seems rather obvious that due process requires a reasonable notice and opportunity to be heard and that a hearing of this motion at 9:30 a. m. on September 30, 1947 would deny unto these appellants due process of law in contravention of the mandate of the Fifth Amendment to the Constitution of the United States, the benefit and protection of which these appellants are entitled in law and now claim and urge.

3. The motion and statements made therein with respect to its emergency character are unverified. Furthermore, the motion presents matters completely extraneous to this proceeding and contains intemperate and unfounded remarks, unsupported by the record, calculated to prejudice this court against appellants and their counsel. Counsel for the appellants desire to assure this court that these appeals are being taken in good faith and in the interests of their clients and for the protection of their rights.

4. The orders appealed from are clearly appealable orders, and even if there were some question with respect to whether they are appealable (which we do not concede to exist), appellants are entitled to a hearing on the substantial merits of their appealability under well-settled principles of appellate procedure rather than have the appeals summarily disposed of on a motion to dismiss prior to certification to this court of appellants' record on appeal heretofore designated and now on file in the office of the Clerk of the District Court.

5. Appellants have taken all necessary steps required by the rules for the perfection of an appeal expeditiously and earlier than the time required by said rules; they filed with the Clerk of the District Court on September 29, 1947, their several notices of appeal, their joint statement of points relied on for reversal, and their joint designation of contents of appeal record, and on said date mailed to all counsel of record copies of a notice in due form, together with copies of said statement of points and designation of contents of appeal record. Counsel for appellants will shortly be prepared to file with the Clerk of the District Court the items designated in the appeal record.

6. This court is without jurisdiction to entertain and act upon the motion to dismiss the appeals for the reason that appellants' designation of points and said appeal record to be relied on for reversal are not before this court and this court is, therefore, powerless to know the nature and purpose of these appeals until such record is before it. Furthermore, appellants are entitled to have such record is before it. Furthermore, appellants are entitled to have that part of the record designated by them before this court because this court cannot determine the nature and purpose of the appeals until such record is before it. The questions raised by these appeals have never been decided, as appears from the appellants' designated record. As a matter of fact, prior to entry on September 12, 1947, of the orders from which these appeals have been taken, these same counsel for appellees presented to the District Court a draft order wherein they requested the District Court to find the following:

> "Finds that said petition is a petition for rehearing of objections which the petitioners heretofore have made to the plan of reorganization heretofore approved and confirmed, and to the

order of sale heretofore entered herein, and presents matters heretofore heard and adjudicated by this Court and by the Courts of appellate jurisdiction, and that the same should be denied."

But the District Court refused to so find and instead, in ink, crossed out such proposed finding from the form of order as entered, as will more fully appear from the appellants' record when appropriate copies of said order are filed herein, appellants being advised on information and belief that the orders designated in appellees' so-called short record do not disclose these facts. The transcript of the hearings before the District Court on September 12, 1947 will disclose the statement of the Court to the effect that he did not intend to make such findings consistent with those suggested by counsel for appellees, as above set forth. The transcript of the proceedings of September 12, 1947 is a part of the appeal record designated by the appellants. When these facts, in addition to appellants' statement of points relied on for reversal, are before this court, it will become clearly evident that the questions which appellants are trying to have heard by this appeal have never been previously determined.

7. Appellants clearly have an appealable interest from final or temporary orders which denied and dismissed their petitions seeking to clarify, modify or relax an injunctional prohibition against the prosecution of the cause or causes of action in said petitions more fully described, particularly where the court in the first instance was without jurisdiction to issue such a broad, sweeping injunctional order prohibiting or purportedly prohibiting the institution and prosecution of the cause or causes of action contemplated by the appellants.

8. Claimed or pretended emergencies do not create rights. Neither should they be permitted to abrogate existing rights. This is particularly true in

this case where rights have been in existence long prior to the claimed or pretended emergency. The inpact of this principle is all the more emphasized where, as here, the claimed or pretended emergency upon which this court is asked to act judicially is premised upon unverified general statements of interested counsel, and is nowhere cited to any portion of the record for its support. The buyers of Chicago Transit Authority bonds and counsel for alleged underwriting syndicates are not parties to this appeal and nowhere does their interest in the subject matter of appellants' appeals appear in the record; further, such interest, if any, is junior and subordinate to appellants' rights and causes of action inherent in appellants' appeals. It is not the duty of this court to protect the buyers of Chicago Transit Authority bonds and alleged underwriters; rather, it is the duty of this court to adjudge the rights of litigants properly before it within the limits of its jurisdiction.

9. In urging that appellants have no equity in the debtor and therefore no appealable interest, being Point III of appellees' motion, appellees have entirely misconceived the nature of appellants' causes of action as set forth in the petitions. This would more fully appear if appellants' statement of points relied on for reversal were in the record presently before the court. The appellants do not seek to prosecute any action against the debtor, nor have the appellants placed the plan of reorganization in issue by their appeals. Appellants seek to prosecute actions against the City of Chicago and the Chicago Transit Authority arising out of (a) contractual liabilities created by an ordinance passed by the City Council of Chicago in 1907 pursuant to authority previously granted said City by the legislature of Illinois by an act more commonly known as the "Mueller Act" and other documents including the Consolidated Mortgage; and (b) the granting of and the provisions of the ordi-

nance passed by the City Council of the City of Chicago on April 23, 1945 to the Chicago Transit Authority, which ordinance was accepted by the Chicago Transit Authority, all as set forth in the petitions. Appellants' asserted causes of action do not in any way interfere with the District Court's jurisdition of the debtor or its estate or its lawful reorganization. Appellants do not by their appeals seek to retry issues heretofore adjudicated. Appellants by their appeals merely seek to obtain clarification, amendment and relaxation of injunctional orders heretofore entered by the District Court, which on their face prohibit or purport to prohibit appellants from prosecuting causes of action against persons other than the debtor, and concerning whose liabilities the District Court was without jurisdiction to extinguish, modify or adjudicate.

10. The above and foregoing are not intended to be all inclusive of appellants' objections to the motion to dismiss the appeal or the principles in support thereof. But appellants reserve the right to argue these and others orally, and resectfully request that this court, in view of all attendant circumstances, grant additional time to appellants for the filing of written briefs.

In point of information, this was dictated at 10:45 p. m. on September 29, 1947, when one of appellants' counsel had yet a journey of some forty miles to his place of abode. Thereafter, the transcription, editing and typing of these objections was completed at about 2:30 a. m. on September 30, 1947.

11. Appellants do not here cite authority to support these objections because of lack of time in preparation, but request leave to argue the motion orally and to cite authorities upon said oral argument, and leave to submit written briefs as above requested, all without prejudice to their rights to have these appeals proceed in an ordinary and customary man-

ner and without prejudice to the rights of appellants to bring before this court their own record and brief and argument and to have oral argument thereon in a hearing upon the merits of these appeals.

The emergency motion and the objections were ordered filed by the Court upon its convening on September 30, 1947, and thereupon the court heard oral arguments. At the conclusion of the arguments, the court, from the bench, orally dismissed the appeals (R. 146, 147). The arguments of counsel, the comments of the court during the course of the argument and its oral pronouncement were made a part of the record upon petitioners' motion (R. 102). These proceedings begin at page 104 of the record. They clearly indicate the grounds upon which the Circuit Court dismissed the appeals. Particularly we desire to point out the comments of Judge Evans with respect to the effect of the injunctional order beginning on page 132 of the record and again on page 133 and 134 of the record; and to His Honor's comments beginning on page 137; and the proceedings thereafter to the end of the hearing, with particular reference to His Honor's following observation (R. 144, 145):

> "If your appeal is not frivolous you have a right to be heard. We are considering your appeal, and the statute gives you a right to appeal, and we are considering the grounds for dismissal on the grounds that it is frivolous and without merit, and these facts about this emergency matter."

As indicated, the facts about the emergency matter were unverified and were not and could not be record matters in this appeal.

III.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in dismissing the appeal for the reason that it had not acquired jurisdiction so to do.

2. The judgment of the Circuit Court of Appeals dismissing the appeal denied petitioners due process of law contrary to the Fifth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals erred in not holding that the District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

4. The Circuit Court of Appeals erred in not holding that the substantive questions raised by the petitions had not been previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the Plan.

5. The Circuit Court of Appeals erred in not holding that the orders from which the appeals were taken were appealable orders.

6. The Circuit Court of Appeals erred in not holding that petitioners have an appealable interest in the subject matter of these appeals.

7. The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionality and construction of those state laws which, in the absence of authoritative state deci-

sion, should be left for decision in appropriate proceedings in the state courts.

8. The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the Federal Courts.

9. The Circuit Court of Appeals erred in sustaining the motion to dismiss the appeals.

SUMMARY OF ARGUMENT.

1.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that it had not acquired jurisdiction so to do.

An appellate court does not acquire jurisdiction to dispose of an appeal until there has been observed the necessary steps upon which its appellate jurisdiction is premised, or there has been a failure to observe same.

2.

In dismissing the appeals, the Circuit Court of Appeals denied petitioners due process of law contrary to the fifth amendment to the constitution of the United States.

3.

The Circuit Court of Appeals erred in sustaining the emergency motion to dismiss the appeals.

(a) The District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

(b) The question of whether petitioners could prosecute a suit against the City of Chicago and Chicago Transit Authority of the character contemplated by the petitions to relax and modify had not been previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the Plan; and even if it was decided, being a question of jurisdiction of the subject matter, it could be reconsidered on a subsequent appeal.

(c) The orders appealed from were appealable orders.

(d) Petitioners have an interest in the subject matter of their appeals.

4.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionality and construction of those state laws which, in the absence of authoritative state decision, should be left for decision in appropriate proceedings in the state courts.

5.

The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the federal courts.

IV.

ARGUMENT.

1.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that it had not acquired jurisdiction so to do.

An Appellate Court does not acquire jurisdiction to dispose of an appeal until there has been observed the necessary steps upon which the appellate jurisdiction is premised or there has been a failure to observe same.

Petitioners filed notices of appeal in the District Court and at the same time filed their designation of record, and inasmuch as the entire record wasn't designated, their statement of points relied upon. That day they sent notice of such filing to opposing counsel. All of this was done conformably to Rules 73 and 75 of the Rules of Civil Procedure. Within a matter of minutes after such filing, respondents filed a designation of record in the District Court and within an hour thereafter served petitioners with a copy of their designation and an unverified emergency motion to docket and dismiss the appeals so taken and a notice that within an hour they would appear in the Circuit Court of Appeals for a hearing on the motion. All counsel appeared and the matter was continued until the convening of the Court the next morning.

That morning respondents filed a short record and a motion to dismiss, the petitioners filed written verified objections, the Court heard oral arguments and the appeals were dismissed. The only record matters in the short record were those called for by respondents designation,

which, except for the original petitions, the orders denying same and the notices of appeal, contained none of the record called for by petitioners' designation. Petitioners' designation and statement of points were on file in the District Court at the time respondents' designation was filed there.

Under Rule 73 there were yet 39 days remaining within which the record on appeal could be filed and docketed. Ignored was Rule 75(g) which provides that the "clerk of the District Court . . . . shall transmit to the Appellate Court a true copy of the matter designated by the parties but shall always include, whether or not designated, copies of the following: . . . . *the designation or stipulations of the parties as to the matter to be included in the record; and any statement by the appellant of the points on which he intends to rely*". Rule 75(g) further provides that "The matter so certified and transmitted constitutes the record on appeal".

Rule 10(1) of the Seventh Circuit provides that "The record on appeal shall be prepared and the transcript thereof filed in this Court, as provided in Rule 75 and 76 of the said rules of Civil Procedure". Rule 9(1) of that Court also provides that in all appeals "the appellant shall file with the clerk of the district Court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged". It also provides that "*No appeal shall be considered, unless such a statement of points shall have been so filed*".

Rule 75(j) of the Rules of Civil Procedure provides that "If, prior to the time the complete record on appeal is settled and certified as here provided, a party desires to docket the appeal in order to make in the Appellate Court

a motion for dismissal, ... the Clerk of the District Court at his request shall certify and transmit to the Appellate Court *"a copy of such portion of the record or proceedings below as is needed for that purpose."*

The only provision for an emergency motion is found in Rule 19(4) of the Seventh Circuit which states that such a motion "with proof of service of same shall be filed and at once tendered to the Court by the Clerk for instructions as to the manner of submission and date of same."

Obviously this rule could not contravene the rules of Civil Procedure and it should not be construed so as to contravene rules 9(1) and 10(1) of the same Court. In dismissing this appeal, the Court ignored its own Rule 9(1) and it ignored Rule 10(1) unless it can be said that it acquired jurisdiction pursuant to the provisions of Rule 75(j). Whether it would or not depends upon the question of whether there was transmitted to it by the Clerk "a copy of such portion of the record or proceedings below" as was necessary for the purpose of dismissal.

We could cite many cases to the effect that before a court acquires a jurisdiction it must proceed according to the established modes governing the class to which the case belongs. This is an appeal and it would seem elemental that the court, to acquire jurisdicton, should proceed according to the necessary rules upon which its jurisdiction is premised. As was stated in 10 Cyc. of Federal Procedure (2d Ed.), Section 4718, p. 87:

> "There is, of course, an obvious distinction between the abstract 'jurisdiction' which a reviewing court is accorded by statute and the jurisdiction which it exercises in a concrete case. It is presupposed that in a given case the necessary routine, upon the carrying out of which the taking of appellate jurisdiction is premised, will be observed. If it is not, jurisdiction is not acquired."

It is submitted that in the first place Rule 75(j) was not intended to apply to a situation comparable to the one at bar, but was only intended to apply to situations where there had been a failure to comply with the procedural requirements of an appeal (*Lynch* v. *Durfey*, 108 F. (2d) 181; *Halfpenny* v. *Miller*, 232 U. S. 113, 115; *Bennell Realty Co.*, v. *E. G. Shinner & Co.*, 87 F. (2d) 824, 826; *Davis* v. *F. W. Woolworth Co.*, 54 F. (2d) 366).

Further, if it does apply there was not transmitted to the Court, "a copy of such portion of the record of proceedings below as is needed" for the purpose of dismissal. How could the Court judicially know what the appeal was about without the statement of points relied on for reversal? How could it judicially know the record facts supporting those points without it having that part of the record called for by petitioners' designation? Would it acquire jurisdiction to act upon a record which did not contain those matters? Can it judicially act upon a record selected solely by an appellee and accompanied by an unverified "emergency" motion containing collateral matters involving the interests of persons, not parties to the proceeding?

Rule 75(j) must be read with Rule 75(g) so that where there is on file in the District Court an appellant's designation of record and statement of points at the time an appellee files its designation and thereafter moves for a dismissal, the record to be filed in support of such motion to docket and dismiss must contain, as Rule 75(g) provides before it can constitute "the record on appeal", a copy of "the designations or stipulations of the parties as to the matter to be included in the record and any statement by the appellant of the points on which he intends to rely". Only in that way will the necessary procedural steps inci-

dent to the acquisition of jurisdiction on the part of the Circuit Court of Appeals be observed and only thereby will that Court acquire jurisdiction. Compare *Lynch* v. *Durfey*, 108 F. (2d) 181; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290.

2.

In dismissing the appeals, the Circuit Court of Appeals denied petitioners due process of law contrary to the fifth amendment to the Constitution of the United States.

The motion in the Circuit Court presented the question whether the appeals should be dismissed. That depended, of course, not only upon the law, but also upon the facts with respect to the appeals. An opportunity to present facts upon the question was just as important to petitioners as an opportunity to argue the law. It is self-evident that both the facts and the law are essential to a consideration of any legal question and that due process requires an opportunity to be heard upon the facts, as well as the law. Such was the view of this court in *Saunders* v. *Shaw*, 37 S. Ct. 638; 244 U. S. 317, 319; 61 L. Ed. 1163, 1165, where no opportunity to present facts by the introduction of evidence was held to violate the due process clause.

The petition at bar shows that the Circuit Court denied petitioners an opportunity to be heard, in that they had no opportunity to present facts to the Circuit Court with respect to their appeals. On the very day when petitioners filed in the District Court their notices of appeal, joint designation of record and joint statement of points relied on for reversal, they were served, at 3:15 p.m., with notice of the motion to docket and dismiss their appeals, supporting suggestions and appellees' designation of rec-

ord. The motion was set and came on for hearing at 9:30 a.m. the following day, when petitioners, with leave of court filed written objections to the motion, reciting the foregoing facts, suggesting that the record designated by petitioners was not before the court and specifically raising the question of due process. Notwithstanding, the court proceeded to consider the motion and dismissed the appeals. At no time was the record designated by petitioners on file or otherwise before the Circuit Court.

By the timely filing of their notices of appeal designaion of record and appeal bonds, petitioners set in motion the machinery which would transmit their record from the District Court to the Circuit Court. Having done that, they had done all they could do. That was their only opportunity to present facts to the Circuit Court, that court being of course, confined to the record in considering the facts of the appeals. That court denied petitioners their only opportunity by proceeding without their record. Appellees' record did not supply the omission. With minor exceptions, that record contained none of the record designated by petitioners. Certainly, petitioners were not limited by appellees' record. Petitioners took the appeals; and they had a right, by their own designation of record, to support their appeals factually as they saw fit.

This is not a question of the adequacy of an opportunity to be heard, which varies according to the nature of the proceeding. This is a case where there was no opportunity at all with respect to an essential element of due process, namely, the right of a litigant to present to the court the facts of his case.

The merits of the motion have no bearing upon the present contention of petitioners. Whether they would,

with due process, have prevailed against the motion, has nothing to do with due process. Right or wrong, they were entitled to an opportunity to be heard, *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424; 35 S. Ct. 625; 59 L. Ed. 1027, 1032. However, as petitioners argue hereafter, they should have prevailed against the motion. The motion being without foundation, the merits of the appeal should have been considered, and by denying petitioners the opportunity to file their record, the Circuit Court of Appeals denied them due process both as to the motion and as to the merits of the appeals themselves. While an appeal is not necessary to due process, if the statute gives an appeal, it becomes a part of the proceeding and subject to the requirements of the due process clause. *Frank* v. *Mangum,* 237 U. S. 309 , 327, 59 L. Ed. 969, 980, 35 S. Ct. 582; *Boykin* v. *Huff,* 121 Fed. (2d) 865, 872.

Petitioners, it is true, received the formalities of a hearing. But due process of law is not concerned with the mere form of procedure. *Palko* v. *Connecticut,* 302 U. S. 319, 327, 82 L. Ed. 288, 293, 58 S. Ct. 149; *U. S. National Bank* v. *Pamp,* 83 Fed. (2d) 493, 503. Here the substance of a hearing was lacking. Not only were petitioners deprived of the right to present their facts to the Court, but consider the notice. Must an appellant be ready under penalty of dismissal to fully and thoroughly argue his appeal within twenty-four hours from the time his notice of appeal is filed insofar as due process is concerned? If he must then the Rules of Civil Procedure are illusory.

In this case, petitioners never saw the emergency motion to dismiss until 3:15 in the afternoon. It and the suggestions accompanying it cover thirteen pages in the record (Rec. 66-78). It cited eleven cases. The notice accompanying it advised that it was to be presented for a hearing

at 4:00 o'clock that afternoon. We arrived at the Circuit Court of Appeals at the appointed hour and about 4:45 were advised by the Clerk that the matter had been continued until 9:30 A.M. the next morning. Thereupon we returned to our offices where, until 2:30 A.M. on the morning of the hearing, we were involved in the preparation of our suggestions in opposition to the motion to dismiss (Rec. 82-89). And this in a case which involves probably the most important public utility matter in the experience of Chicago. And all of this because of unsupported, unverified allegations in the motion (Rec. 66, 67) with respect to the probable activities of persons not parties to the record!

Furthermore, the effect of the dismissal is to preclude petitioners, under penalty of criminal contempt, from prosecuting a cause of action. For practical purposes, this is tantamount to a denial of the right to sue on such cause of action. An existing right to sue is property and a denial of that right is a denial of due process (*Angle* v. *C. M. & St. P. R. Co.*, 151 U. S. 1, 14 S. Ct. 240, 247); *Martinez* v. *Fox Valley Bus Lines*, 17 F. Supp. 566, 577; 12 Am. Jur. p. 348, sec. 661).

3.

The Circuit Court of Appeals erred in sustaining the emergency motion to dismiss the appeals.

If it be assumed that the Circuit Court of Appeals had jurisdiction to dismiss the appeals and did not deny petitioners due process in the dismissal thereof, still on the merits of the emergency motion, the appeals should not have been dismissed for the reasons following:

(a) The District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

The question here is not whether the substantive cause of action asserted against the City of Chicago and the Chicago Transit Authority under the 1907 ordinance as set forth beginning on page 14 of this brief is well founded for the obvious reason that that question depends upon the construction and constitutionality of a state statute and a city ordinance not heretofore construed as to this point and is a question of purely local state law, to be determined by the State courts (*American Federation of Labor* v. *Watson,* 327 U. S. 582, 599). The question here is whether or not the District Court could jurisdictionally enjoin the prosecution of a suit of this character.

The effect of the dismissal of the appeal is to preclude petitioners under penalty of criminal contempt, from prosecuting such a suit in any court, irrespective of the District Court's jurisdiction to enter the injunctive order (*U. S.* v. *United Mine Workers,* 91 L. Ed. (Adv. Op.) 595, 614). The instant decision is directly contrary to this same court's opinion in *Re Diversey Bldg. Corporation,* 86 Fed. (2d) 456, where the District Court entered an injunctive order in a 77B proceeding involving the Diversey Building Corporation, which enjoined the prosecution of suits against one Becklenberg, a guarantor of a bond issue. The plan of reorganization there contemplated, among other things, the release of Becklenberg from his original guaranty. The question there presented was whether the District Court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the reorganization plan

which had been approved by the court after its acceptance by two-thirds in the amount of allowed and affected claims of each class of creditors, but which had not been accepted by appellants who were bond holders of the original bond issue.

In answering that question in the negative, this same court, through Judge Sparks, said that its attention had "not been directed to any section of the bankruptcy act which would authorize the issuance of this injunction," and further stated (pp. 457, 458):

> "The trouble here is that the court exceeded its jurisdiction with respect to the subject matter before it. Appellants were in no way interfering or threatening to interfere with the court's jurisdiction of the debtor or its estate, or its lawful reorganization. Their actions and threatened actions were merely in derogation of that part of the plan which proposed to release Becklenberg's guaranty of the original bonds. *Their position was sound and the court was without jurisdiction to restrain them in this respect.* It is quite true that a continuation of appellants' activities might have frustrated the approved plan, but if so, it was because it was too extensive in its scope. It not only purported to reorganize the debtor's estate by reducing the amount of its debt and interest and extending the time of payment, but it also essayed to reduce the indebtedness of Becklenberg and extend his time for payment. *His estate is not subject to reorganization under section 77B, and he can not modify his obligations by the reorganization of other insolvents.* The only relief which he may seek under the Bankruptcy Act, with respect to his debts, is to be found under Section 74 as amended on June 7, 1934 (11 U.S.C.A. Sec. 202), and the provisions of the act as it existed before that amendment; and he is not entitled to relief under those provisions until he tenders his estate to the bankruptcy court for administration, and es-

tablishes the fact that he is insolvent, or is unable to meet his debts as they mature. None of these facts appear, hence the court was without jurisdiction to make the order complained of insofar as is affected the original guaranty of Becklenberg." (Italics ours)

The same is true at bar. Neither the City of Chicago nor the Chicago Transit Authority was subject to reorganization in the proceedings which involved the Chicago Railways as a debtor, and the District Court was, therefore, without jurisdiction to modify their liabilities or obligations by the reorganization of other insolvents.

The instant decision is contrary to the decision of the Second Circuit in *Re Nine North Church Street, Inc.*, 82 Fed. (2) 186, cited with approval in the *Re Diversey Building Corporation* case (p. 458). There the question arose as it arose in the case at bar. A motion was filed to vacate an injunction restraining the prosecution of a suit pending in the state court against the Maryland Casualty on its guaranty of a mortgage debt, which under the debtor's plan of reorganization, had been reduced. The injunction prohibited the suit on the guaranty except as reduced by the plan. The motion to vacate the injunction was denied by the District Court, and, in reversing, the Second Circuit said:

"Section 77B is part of a general amendment to the Bankruptcy Act for the relief of debtors. Its provisions are conditioned upon a showing by the corporate debtor of facts evidencing need for relief and that the corporation is insolvent or is unable to meet its debts as they mature. By its guaranty, Maryland promised to meet certain obligations and these are not affected by reorganization of this debtor. Any modification of this contract can only be justified by the bankruptcy power which extends only to the relief of insolvent or hard pressed debtors. If

Maryland is in that class, it must come into court and establish the fact. It cannot modify its obligations by the reorganization of other insolvents.

The debtor's argument that the certificate holders' rights against Maryland must be modified to allow a reorganization of this debtor is unconvincing. If the certificate holders collect on their guaranty, then Maryland will have a claim against the debtor. The reduction of this claim may be essential to a reorganization of the debtor. If it takes place, the debtor will be relieved by the reduction. Maryland will no doubt be dissatisfied since it must bear the burden of the reduction. But that is as it should be. Maryland assumed the guaranty and must now be held to it. To allow a guaranty to be modified every time the principal debtor found itself in financial difficulties would be to make a guarantor's obligation nominal only. The very purpose of, and only value in a guaranty is as a protection against the principal's inability to pay. Without a reorganization of the guarantor and a showing that its financial conditions justify relief from its obligations, the contract between the obligees and the guarantor is inviolate."

At one time during the course of the argument on the motion to dismiss the appeal, the Court appeared to agree with our contention. After indicating that there was only one possibility of the injunctive order "being construed beyond its application to this debtor, the street car company", and after referring to that language in the injunctive order (R. 132), Judge Evans stated (R. 133):

"Now it would seem as though it would be far fetched under this question to say that the Court was passing upon the reorganization of the debtor should have included by its injunction a restraint upon your clients or creditors against some third party that they may have added, because the injunction was di-

rected to the reorganization of the debtor alone. *That was not the question that was before the Court.* The Court was trying to reorganize the debtor pursuant to a plan that had been presented which called for a sale of a large piece of property with many claims, and no one should be permitted to follow that with one of these claims as the sale takes place to the detriment of the sale or the harassment of the purchaser. Suppose you should have had a guarantee from me that if we bought those bonds, do you think that this kind of a proceeding would enjoin you from suing me". (Italics ours)

Thereupon, petitioners' counsel stated that the parties were in accord that the literal language of the injunctive order prohibited petitioners from "prosecuting any action against the City of Chicago, the guarantor or the purchaser". And Judge Evans stated that if the action was against the City of Chicago, "it would completely interfere with the plan". Thereupon petitioner's counsel read from the opinion in the *Diversey* case (ante p. 39) and Judge Evans observed (R. 137):

> "I don't think there can be any complaint about the ruling you have read. I can not see how in the reorganization of one debtor that if there is some suit or some claims between one of the creditors and some third party, that the Court has anything to do with that but it might have something to do with the reorganization of the debtor; and in everything that relates to the reorganization of the debtor it does have jurisdiction, and in some instances it might have, and I can see how it could have where as a practical proposition the third party is present and really vitally interested in the plan of reorganization and whether they should be permitted to pursue its claim against the said party might be a legitimate basis of jurisdiction and a relieving order.

> As a general proposition, as between "A" and "B", there could be cases where "B" the creditor might be barred from any claim against "A" but there might be a claim against "C". That is the way that case held and that is clearly right."

In other words, the fact that the third party was "present and really vitally interested in the plan of reorganization" would furnish "a legitimate basis of jurisdiction and a relieving order" against the pursuit of a claim against such third party, according to the Court. It is obvious that the Court completely misunderstood its prior decision in the *Diversey* case (*ante,* p. 39) because the third party there (Becklenberg) was a party to and vitally interested in the reorganization as it contemplated his release from the guaranty of the old bond issue in consideration of his guaranty of the new one contemplated by the plan. And the decision is directly contrary to that of the Second Circuit in *Re Nine North Church Street, Inc.,* 82 Fed. (2d) 186 for the same reason.

There would be no point to the assurances given persons who invested in reliance upon the provisions of the Ordinance if the City could escape its obligation merely because the principal debtor became insolvent and it became interested in such insolvency. The Ordinance doesn't say that the properties will be resold at the ordinance price after February 1, 1927, except in case the Chicago Railways goes bankrupt. If the only security which Series B Bondholders had in the reorganization affected by the 1907 ordinance was the solvency of the Chicago Railways, what point is there in the Ordinance? And it is to be recalled that, in construing the ordinance and statute in question, Judge Wilkerson stated that the ordinance manifested *"a clear intention,* not only to provide terms and

conditions covering the City's consent to use of City's streets during the grant, but also *to provide assurance legally obligatory on the City for the protection of the investment,* 'at and after' as well as 'during' the term expiring February 1, 1927" (*Harris Trust and Savings Bank* v. *Rys. Co.* 39 Fed. (2d) 958, 960).

Now, if this case involved a mere grocery store worth Ten Thousand Dollars ($10,000.00) and someone loaned Thirty Five Hundred Dollors ($3500.00) on that store and took a mortgage on someone else's assurance that if anybody purchased that store twenty years later the purchase price would be Ten Thousand Dollars ($10,000.00), and the grocery store owner went bankrupt and someone purchased the store at the bankruptcy sale for Five Thousand Dollars ($5,000.00), no one would even listen to an argument that the assurer of Ten Thousand Dollars ($10,000.00) could have his liability extinguished in the bankruptcy decree involving the original owner who got the Thirty Five Hundred Dollars ($3500.00) in the first place only upon the faith of the assurance.

But this isn't a grocery store. It is a large public utility and instead of involving thousands, it involves millions. Being such an important case, it requires many important points and much argument on complex and confusing issues which blanket and obscure the simple homespun principle we are trying to maintain. All is lost in the pragmatism of emergency and crisis. We must protect the purchaser of this vast utility, it is only worth seventy five million, not one hundred and seventy five million, the people of Chicago will walk the streets if the traction problem is not settled immediately, the investment bankers won't purchase bonds of Chicago Transit Authority, their lawyers won't pass them, the case is

one of overwhelming impelling public interest run the arguments which thus far have denied us the right to determine whether this Ordinance of 1907 means what it says, and what Judge Wilkerson said it meant. It really seems odd that the matter is controversial.

(b) The question of whether petitioners could prosecute a suit against the City of Chicago and Chicago Transit Authority of the Character contemplated by the petitions to relax and modify had not been previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the plan; and even if it was decided, being a question of jurisdiction of the subject matter, it could be reconsidered on a subsequent appeal.

The second ground of the motion to dismiss the appeals was that all "substantive questions" had been decided by the Circuit Court in its decision affirming the District Court's approval and confirmation of the plan.

To begin with, the District Judge refused to specifically hold that the matter raised by the petitions had been previously adjudicated when the tentative drafts of the orders denying the petitions specifically incorporating those findings were presented to him by respondents. He crossed them out in ink and signed the orders as thus deleted (see Petitioners' Objection 6 to Emergency Motion to Dismiss Appeals, Ante, p. 21; Rec. 85-86).

Further, an examination of the opinion of the Circuit Court of Appeals (160 F. (2) 59) will clearly disclose that it carefully refrained from passing upon the question. The matter is discussed beginning on p. ..... of the opinion. The point raised by appellants there (petitioners here) was that "the plan deprives them of contractual rights contained in the 1907 ordinance and that the Court was without jurisdiction to order the release, or reduction of

the rights of Series B bonds." The sole question was whether the plan should be approved, not whether petitioners had other and independent rights against persons not the debtor in those proceedings.

The Court concluded by saying (p. 66):

> "True, Sec. 23 (the ordinance of 1907) does provide that if, after the expiration of the ordinance, the City should grant a franchise to a new company, the new company shall buy the property upon the terms upon which the City might have purchased. Even so, that fact *under the circumstances of this case, is no reason why the plan should not be approved since all contingent rights of a debtor* pass to its trustee and become a part of its estate (citation) and may be dealt with in Chapter X proceedings" (italics ours).

Observe the guarded character of the language in italics. The question raised by this appeal has nothing to do with the approval of the plan. Neither are we claiming any contingent rights of or against the debtor. We concede those rights are subject to extinguishment in a Chapter X proceedings. Was that Court saying that we had no independent rights against the City or the Transit Authority under the Ordinance passed pursuant to statutory authority? Was that Court composing and extinguishing liabilities under that Ordinance of persons other than the debtor? Particularly so in a case were no Illinois Court had passed upon that question? That Court was merely deciding whether "the plan should not be approved," and was merely composing and extinguishing the "contingent rights of a debtor."

It had no jurisdiction to do anything else as we have pointed out. And if it did actually decide that the City of Chicago and the Chicago Transit Authority had no liability to us under that Ordinance, having no jurisdiction

so to do, the question can be raised again for jurisdiction over the subject matter can be raised at any time and in any proceeding.

In *Sheldon* v. *Wabash R. Co.*, 105 Fed. (2d) 785, 786, the District Court, upon consideration of a demurrer for want of jurisdiction of the subject matter, laid down the rule that the question is always open for determination,

> "even though there may be in the case prior rulings of the same or another judge sustaining the jurisdiction."

In *Blossfield* v. *Pacific Tank Pipe Co.*, 15 Fed. (2d) 889, a motion to dismiss the complaint for want of jurisdiction had alreay been denied when the matter was again suggested upon motion. Dismissing the suit, the court said (p. 890):

> "Plaintiff argues that the oral ruling has become the law of the case and that it therefore may not be set aside. Were not the jurisdiction of the court in question, this must have been conceded * * * It would be not only an extraordinary but a useless thing to permit the trial of a case which, on the allegations of the complaint, must be dismissed for want of jurisdiction at the close of the plaintiff's case, which, if not then dismissed, must be dismissed, on the court's own motion (citation), at any time before entry of a final decree at which the lack of jurisdiction was suggested; and which, on appeal, would be dismissed, rather than reviewed, because of lack of jurisdiction in the trial court (citations)."

In *Connet* v. *City of Jerseyville*, 110 Fed. (2d) 1105, lack of jurisdiction had been suggested on rehearing before this same Court (two of the instant judges sitting) and rehearing denied. Want of jurisdiction was urged upon a second appeal, and the Court considered whether

appellant was prevented from raising that question by the rule of the law of the case, saying (p. 1108):

> "Regardless of the effect of our previous decision we are of the opinion that 'when the jursidiction of the court as a federal court is called in question, liberality of practice should be indulged, to the end that the question may be indubitably heard and determined.'"

And, after noting the distinction between the law of the case and *res judicata*, that the first directs discretion and is a question of submission, whereas the second supersedes and compels judgment and is a question of power, the Court said that law of the case does not limit the power of the court to reopen what has been decided, and reconsidering the question "regardless of the effect of our previous decision," held that the District Court had no jurisdiction of the subject there in question.

The Circuit Court on the appeal from the orders approving the Plan scrupulously avoided the question of jurisdiction to deal with petitioners' rights against the City and the Transit Authority. By their petitions to modify and relax the injunction, petitioners directly challenged the District Court's jurisdiction; and the appeals to the Circuit Court squarely raise that question. That question ought to be finally and decisively settled; and the second ground in support of the motion to dismiss, that all "substantive questions" had been decided on the appeal from the orders approving the Plan is entirely without merit.

(c) The orders appealed from were appealable orders.

The first ground of the motion to dismiss was that the orders were not appealable. The orders from which the appeals were taken were entered upon a hearing in bankruptcy, as the orders themselves indicate. They denied and dismissed the petitions to modify and relax the in-

junction contained in the order of sale. It is clear that the injunction was interlocutory as were the orders denying modification thereof, for the sale had not been consummated, even at the time the appeals were dismissed, as shown by the motion to dismiss and oral argument in support thereof. Moreover, by the terms of the injunction itself, set forth in the petitions to modify, the court reserves jurisdiction over matters yet to be adjudicated.

Such being their character, the orders denying and dismissing the petitions to modify were appealable under Section 129 of the Judicial Code (29 U. S. C. 227). This is true though the application to modify is a rehearing of the original application for the injunction. *American Grain Separator Co.* v. *Twin City Separator Co.*, 202 Fed. 202, 205. The fact that Congress made no exception as to rehearings is conclusive that none was intended, and it is not the province of the courts to do so. *American Grain Separator Co.* v. *Twin City Separator Co.*, 202 Fed. 202, 205.

Just such an order as those at bar was appealed from in *Re Nine North Church Street*, 82 Fed. (2d) 168, a bankruptcy matter, raising precisely the question raised by these appeals. And orders in bankruptcy like those at bar have been expressly held appealable under Section 129 of the Judicial Code. (*McGonigle* v. *Foutch*, 51 Fed. (2d) 455, 459-460; *Molina* v. *Murphy*, 71 Fed. (2d) 605, 606.) This ground in support of the motion is therefore without merit.

(d) Petitioners have an interest in the subject matter of their appeals.

The third and final ground for the motion was that petitioners had no appealable interest in the subject matter "of this appeal." The subject matter of these appeals

was the validity of the orders refusing to modify the injunction so as to permit petitioners to sue the City of Chicago and the Chicago Transit Authority. Petitioners' interest in that subject is certainly clear. The appeals had nothing to do with the assets in Bankrupcty, in which petitioners admittedly have no interest. If anyone has an interest in the appeals it would be the petitioners, the City of Chicago, the Chicago Transit Authority, and no one else. The third ground in support of the motion is plainly without merit.

4.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionality and construction of those state laws which, in the absence of authoritative state decision, should be left for decisions in appropriate proceedings in the state courts.

It seems rather obvious that the question of whether petitioners have a cause of action of the nature asserted is a question which depends solely upon the constitutionality and construction of the Ordinance of 1907 and of the Mueller Act of Illinois, pursuant to which the Ordinance was passed. A decision of that question by a Federal court would not be determinative if a state court should say that its statute and ordinance meant something different than the Federal court said it meant. Under the doctrine of *American Federation of Labor* v. *Watson*, 327 U. S. 582, and related cases, the Federal courts should refrain from passing upon the constitutionality and construction of state laws until the state courts have had an opportunity to pass upon them. There this court refused

to enjoin the enforcement of the closed shop provision in the Florida constitution, reversed a District Court injunction and remanded the case with directions to retain the bill pending a construction by the state courts, saying (p. p. 595, 596):

> " • • • The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

The case at bar is even stronger for here we are enjoined from *even prosecuting* our asserted action in the state court. Unless this injunction is modified or we are willing to hazard a criminal contempt, the state courts will never get an opportunity to pass upon what is solely a question of state law. To the same effect is *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, where in a bankruptcy proceeding the question of a fee simple ownership of a right-of-way to Illinois land was adjudicated. This Court, through Mr. Justice Black, reversed and remanded

> " • • • To the District Court with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right-of-way to the Illinois state courts." (p. 484).

5.

The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the federal courts.

We have heretofore in the statement of the case set forth the nature of the causes of action asserted (*ante*, p. 14). The Illinois Supreme Court has held this Ordinance to be a contract between the parties. Thus, in *Chicago Rys. Co.* v. *Chicago*, 292 Ill. 190, the court said (pp. 201, 202):

> "It is generally held by courts that when a privilege or right to use a street for a lawful purpose is granted by a municipality for an adequate consideration by an ordinance which is accepted and acted upon by the grantee, *it is not a mere license but becomes a contract binding upon the parties from which neither can recede*, and this court has declared that rule in various cases. (*Chicago Municipal Gas Light Co.* v. *Town of Lake*, 130 Ill. 42; *Village of Madison* v. *Alton, Granite and St. Louis Traction Co.*, 235 id. 346; *People* v. *Chicago Telephone Co.*, 245 id. 121; *City of Springfield* v. *Interstate Independent Telephone and Telegraph Co.*, 279 id. 324.)" (Italics ours)

Again in speaking of this ordinance, in *Chicago City Ry. Co.* v. *Chicago*, 323 Ill. 246, the court said on page 254:

> "It is true that the ordinance constitutes a contract, the obligation of which cannot be impaired; that the rights conferred by it are property in the nature of real estate, of which the appellant cannot be deprived without due process of law and which cannot be destroyed, abridged or damaged for the public use without just compensation."

While up to the present time no Illinois Court has held that the ordinance constituted a contract not only between the Railways and the City but also between the City and those persons who invested their money in reliance upon the terms of that ordinance for the reason that the question has never been presented to an Illinois court, yet it is irrefutable that the ordinance was passed for the direct and immediate benefit of those persons who so invested their money upon the faith thereof. Judge Wilkerson expressly so held in *Harris Trust and Savings Bank* v. *Chicago Rys. Co.*, 39 Fed. 2d 958, 960 (the City was a party) when he said that the Mueller law and this ordinance, passed pursuant to the authority thereof, manifested " a clear intention . . . to provide assurance, legally obligatory upon the City, for the protection of the investment."

In *Carson Pirie Scott and Co.* v. *Parrett*, 346 Ill. 252, the court said (p. 257):

> "The rule is settled in this State that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon. This rule has been announced without variation in numerous cases decided by this court. *Kinnan* v. *Hurst Co.*, 317 Ill. 251; *Vial* v. *Norwich Union Fire Ins. Society*, 257 id. 355; *Searles* v. *City of Flora*, 225 id. 167; *Harts* v. *Emery*, 184 id. 560; *Webster* v. *Fleming*, 178 id. 140; *Lawrence* v. *Oglesby*, id. 122; *Crandall* v. *Payne*, 154 id. 627; *Bay* v. *Williams*, 122 id. 91; *Dean* v. *Walker*, 107 id. 540; *Snell* v. *Ives*, 85 id. 279; *Bristow* v. *Lane*, 21 id. 194; *Brown* v. *Strait*, 19 id. 88; *Eddy* v. *Roberts*, 17 id. 505."

Obviously it is not within the province of the Federal court to determine whether this ordinance was entered into for the direct or incidental benefit of third persons in the event it should be held that our primary claim, namely, that this ordinance constituted a contract between the City and the persons who gave up their securities in reliance upon its terms, was untenable.

Now these Illinois decisions, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 80, and related cases, were binding upon the Federal court. The effect of the decisions of the Illinois Court is thus plain, and controlling force in the determination of whether petitioners have the causes of action set forth in the petition.

CONCLUSION.

Unless this writ is granted and the order of the Circuit Court of Appeals reversed, petitioners will be forever precluded, under penalty of criminal contempt, from prosecuting a plenary action in the state court of the character indicated herein. And this without any authoritative decision from the state court with respect to the liabilities of the City under the Ordinance or that of a purchaser of the property contrary to the provision of said Ordinance. Looking at the case with a 1907 perspective is what is required, for if liabilities of the character here urged were then created, those liabilities exist today for unforeseen economic events do not defeat engagements solemnly induced or invited unless the person seeking to defeat those engagements tenders his estate to a bankruptcy court,—not the estate of another. We respectfully submit that the writ should be granted for the reasons indicated herein.

Respectfully submitted,

BARNABAS F. SEARS,
WILLIAM RUFUS MORGAN,
Attorneys for Petitioners.

APPENDIX.

The Mueller Act, L. 1903, p. 285:

"Section 1. That every city of this State shall have the power to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits, and to lease the same or any part of the same to any company incorporated under the laws of this State for the purpose of operating street railways for any period not longer than twenty years on such terms and conditions as the city council shall deem for the best interests of the public.

"But no city shall proceed to operate street railways unless the proposition to operate shall first have been submitted to the electors of such city as a separate proposition and approved by three-fifths of those voting thereon. It shall be lawful for any such city to incorporate in any grant of the right to construct or operate street railways a reservation of the right on the part of such city to take over all or part of such street railways, at or before the expiration of such grant, upon such terms and conditions as may be provided in the grant; it shall also be lawful to provide in any such grant that in case such reserved right be not exercised by the city and it shall grant a right to another company to operate a street railway in the streets and parts of streets occupied by its grantee under the former grant the new grantee shall purchase and take over the street railway of the former grantee upon the terms that the city might have taken it over and it shall be lawful for the city council of any city to make a grant containing such a reservation, for either the construction or operation or both the construction and operation of a street railway in, upon and along any of the streets or public ways therein, or portions thereof, in which

street railways tracks are already located at the time of making of such grant, without the petition or consent of any of the owners of the land abutting or fronting upon any street of public way, or portion thereof, covered by such grant."

• • •

"For the purpose of acquiring street railways either by purchase or construction as provided for in this Act, or for the equipment of any such street railways, any city may borrow money and issue its negotiable bonds therefor, pledging the faith and credit of the city; but no such bonds shall be issued unless the proposition to issue the same shall first have been submitted to the electors of such city and approved by two-thirds of those voting thereon, nor in an amount in excess of the cost to the city of the property for which said bonds are issued ascertained as elsewhere provided in this Act and ten (10) per cent of such cost in addition thereto. In the exercise of the powers, or any of them, granted by this act, any such city shall have the power to acquire, take and hold any and all necessary property, real, personal or mixed for the purposes specified in this Act, either by purchase or condemnation in the manner provided by law for the taking and condemning of private property for public use but in no valuation of street railway property for the purpose of any such acquisition except of street railways now operated under existing franchises shall any sum be included as the value of any earning power of such property or of the unexpired portion of any franchise granted by said city. In case of the leasing by any city of any street railway owned by it, the rental reserved shall be based on both the acual value of the tangible property and of the franchise contained in such lease, and such rental shall not be less than a sufficient sum to meet the annual interest upon all outstanding bonds or street railway certificates issued by said city on account of such street railway."